

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**In the Matter of**

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**Federal-State Joint Board on  
Universal Service**

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**CC Docket No. 96-45  
(Report to Congress)**

**To the Common Carrier Bureau:**

**COMMENTS OF  
UTC, THE TELECOMMUNICATIONS ASSOCIATION**

UTC, The Telecommunications Association,<sup>1</sup> hereby respectfully submits the following comments in response to the Federal Communications Commission's (FCC) January 5, 1998, *Public Notice*, DA 98-2, seeking public input on the FCC's implementation of the provisions of the Telecommunications Act of 1996 relating to universal service, in order to submit a report to Congress as directed by 1998 appropriations legislation for the Departments of Commerce, Justice and State, H.R. 2267.<sup>2</sup>

**I. Introduction**

UTC is the national representative on telecommunications matters for the nation's electric, gas and water utilities, and natural gas pipelines. Over 1,300 such entities are members of UTC, including investor-owned utilities, municipal electric systems, rural electric cooperatives, and natural gas distribution and transmission companies. All utilities and pipelines

<sup>1</sup> UTC was formerly known as the Utilities Telecommunications Council.

<sup>2</sup> On January 14, 1998, the Common Carrier Bureau extended the comment and reply comment dates in this proceeding to January 26, 1998 and February 6, 1998, DA 98-63.

depend upon reliable and secure communications to assist them in carrying out their public service obligations. In order to meet these communications requirements, utilities and pipelines operate extensive private, internal communications networks consisting of both wired and wireless components.

UTC was an active participant in all phases of the FCC's underlying proceeding implementing the Act's universal service provisions. In earlier comments and reply comments UTC explained that while many utilities and pipelines intend to take an increasingly active role in the provision of telecommunications and telecommunications services, the vast majority will retain a strong need for private internal communications networks. Accordingly, UTC urged the Commission not to adopt an overly-broad interpretation of who is required to contribute to universal service that could inadvertently place an undue burden on critical private networks, or act as a disincentive for the provision of telecommunications infrastructure in rural and remote areas of the country.

## **II. Interpretations of Definitions**

As part of its preparation for its report to Congress the FCC seeks public comment on its interpretations of certain key definitions in the Act. As a general matter, UTC believes that the Commission's interpretations of the terms "telecommunications," "telecommunications service," and "information service," comport with the plain language of the Act. However, some clarifications may be necessary in order to avoid confusion or an overly expansive interpretation of these terms.

Section 254(d) of the Act establishes the broad requirements as to who is supposed to contribute to universal service funding. Section 254(d) states that:

*Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the commission to preserve and advance universal service.*

**A. Telecommunications Service**

**1. Telecommunications**

A necessary starting point for attempting to implement this mandatory contribution requirement is to determine what constitutes “telecommunications services” for purposes of the Act. The Act defines “telecommunications services” as:

*[T]he offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.*

The first element of this definition requires an identification of what is meant by the term “telecommunications.” The Act defines the term “telecommunications” as:

*Transmission between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.*

Accordingly, any activity that does not constitute “telecommunications” necessarily falls outside of the scope of “telecommunications services” for which a contribution to universal service is required.

Interestingly, the FCC did not provide an analysis of the definition of “telecommunications” in its *Report and Order*, but instead adopted a set of examples of services that satisfy the definition. However, despite the omission of a formal discussion of the elements of the definition of telecommunications, it is evident from the plain meaning of the requirement

of “transmission” of information (and the examples of services that the FCC considers to be telecommunications) that it does not encompass the provision of passive infrastructure, that by itself, is incapable of transmission.

Consistent with this requirement, UTC urges the FCC to clarify that the provision of dark fiber does not constitute “telecommunications” under the Act. The lessor of dark fiber does not provide any “transmission” of information; to the contrary, the lessee must acquire and assemble the other active network elements necessary for the transmission of information. Such a clarification for dark fiber would be consistent with a similar clarification that Commission recently made with regard to the lease of “bare” satellite transponder capacity – i.e., an arrangement by which the satellite owner merely provides its customers with the right to transmit to a specified piece of hardware on the satellite – concluding that it is not the offering of a “telecommunications service” as defined in the Act because the satellite owner does not transmit information.<sup>3</sup> Significantly, the lease of a bare satellite transponder involves more than the owner simply providing access to a piece of physical equipment, as in the case of dark fiber. A satellite transponder contains electronics that are maintained by the satellite owner and which actively convert the uplinked signal to a different frequency for retransmission to earth. By contrast, the lessee of dark fiber provides and operates all active components necessary to make the transmission medium a communications pathway.

Clarification that dark fiber is not “telecommunications” and that therefore its lease does not subject the lessor to universal service contribution requirements, or other common carrier obligations of telecommunications service providers, will encourage the provision of

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<sup>3</sup> Fourth Order on Reconsideration, in CC Docket no. 96-45, FCC 97-420, released December 30, 1997, paras. 290-91.

telecommunications facilities to new competitive entrants in rural and high-cost areas by utilities, pipelines and other infrastructure owners.

## **2. Offered for a Fee**

After establishing that the “service” in question is actually “telecommunications” the next requirement under the definition of “telecommunications service” is that the telecommunications be “offered for a fee.” This aspect of the definition makes it clear that Congress only intended the definition to apply to commercial telecommunications services. Applying this definition, the FCC correctly recognized that private networks dedicated exclusively to internal telecommunications are not telecommunications service providers and are therefore not subject to the Act’s mandatory universal service contribution requirements. Accordingly, utilities and pipelines that rely on private communications networks to safely manage, control and coordinate essential services, and which do not offer the use of such communications services to third-parties for a fee are not considered telecommunications services under the Act. Moreover, the FCC appropriately recognized that cost-sharing for the construction and operation of private networks on non-profit basis does not constitute telecommunications services.

## **3. Directly to the Public**

The final element in the definition of “telecommunications service” is that the service must be offered “directly to the public or to such classes of users as to be effectively available directly to the public.” The FCC correctly recognized that the inclusion of this requirement that the service be provided directly to the public evidenced clear Congressional intent that telecommunications services only encompass services provided on a “common carrier” basis. This conclusion is supported by the plain language of the Act, as well as the Joint Explanatory statement that accompanied the Act, which explains that the term telecommunications service “is

defined as those services ... offered on a common carrier basis, recognizing the distinction between common carrier offerings that are provided to the public ... and private services.”<sup>4</sup>

Under this analysis in determining whether a carrier is a telecommunications service provider the FCC will look to whether the service is being offered directly to the public on an indiscriminate basis. Accordingly, private carriers that enter into individually negotiated service offerings will not be considered telecommunications service providers for purposes of mandatory universal service contributions.

## **B. Information Service**

The FCC determined that information service providers and enhanced service providers will not be required to contribute to universal service support mechanisms. UTC agrees with this interpretation as consistent with the clear language of the Act. The Act specifically defines information services as:

*The offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications...*

Under this definition information services are clearly distinct from telecommunications services and therefore information service providers are outside of the scope of the FCC’s authority to assess universal service contribution requirements.

Because the internet is essentially a form of an information service, internet service providers (ISPs) should also properly be exempt from universal service contribution requirements. However, the FCC should consider clarifying that while ISPs themselves are outside of the Act’s universal service requirements, entities that provide the underlying telecommunications transport of internet and other information services for a fee on either a

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<sup>4</sup> Joint Explanatory Statement at 115.

common carrier or private carrier basis are not exempt. This should specifically apply to cable television companies that seek to provide internet access through cable modems and their cable facilities. Otherwise cable companies will be given an unfair competitive advantage to compete against other telecommunications service providers that provide telecommunications transport to ISPs and other information service providers for a fee.

### **III. Assessment of Contributions**

In order to adopt a universal service funding mechanism that is competitively neutral, and easy to administer, the FCC has decided to only assess contributions on revenues from end-users. The practical effect of the FCC's adopted mechanism for assessing contributions is that only telecommunications carriers (common carrier or private) that provide service directly to end-users will be required to contribute to universal service. This approach is entirely reasonable and practical; otherwise, if wholesale carriers were required to make direct contributions based on their net telecommunications revenues they would simply pass those costs on to their carrier customers who, in turn, provide retail services. Moreover, the FCC's interpretation will not act as a deterrent to the provision of bulk telecommunications capacity on a wholesale, carrier's carrier basis by non-traditional telecommunications entrants, such as utilities and pipelines. This in turn will foster telecommunications infrastructure deployment and increase the level of facilities-based telecommunications competition.

### **IV. Conclusion**

The FCC's interpretations of the terms "telecommunications," "telecommunications service" and "information service" are generally consistent with the language of the Act. However, the FCC should clarify that the provision of dark fiber alone does not constitute the offering of "telecommunications." In addition, the Commission should clarify that while ISPs


and other information service providers themselves are outside of the Act's universal service contribution requirements, entities that provide the underlying telecommunications transport of internet and other information services for a fee on either a common carrier or private carrier basis are not exempt.

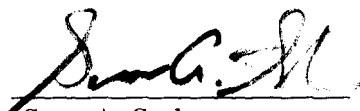
Finally, the FCC's decision to only assess universal service contributions on revenues from end-users is practical and consistent with requirements of the Act.



**WHEREFORE, THE PREMISES CONSIDERED,** UTC respectfully urges Commission consideration of the foregoing comments as it prepares its report to Congress on universal service implementation.

Respectfully submitted,

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